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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 RHODE-NYC, LLC,

4 Plaintiff,

5 v.

22 CV 5185 (LGS)

6 RHODEDEODATO CORP., *et al.*,

7 Defendants.

REMOTE PROCEEDING

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8 New York, N.Y.

9 July 22, 2022

1:00 p.m.

10 Before:

11 HON. LORNA G. SCHOFIELD,

12 District Judge

13 APPEARANCES

14 ORRICK HERRINGTON & SUTCLIFFE LLP

Attorneys for Plaintiff

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LISA T. SIMPSON

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17 Attorneys for Defendants

18 BY: MICHAEL G. RHODES

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(The Court and all parties appearing telephonically)

THE COURT: We are here in the case of RHODE-NYC, LLC v. Rhodedeodato Corp, et al., 22 Civ 5185. This conference is being held on the emergency application from plaintiff. I have looked at your letter, but why don't you speak for yourself and then I will hear from the defendant.

Ms. Simpson.

MS. SIMPSON: Yes. Thank you, your Honor.

So yes, shortly after we concluded our hearing yesterday it seems that defendants despite, on our call with the Court, suggesting that they were willing to work with us to provide some protections and keep them in place while we mediated, something to protect our client's mark from being overrun by defendants' mark, shortly thereafter decided to launch a documentary that they've been talking about in their social media for some time and they were going to launch it today at 3:00. Those announcements appeared mere hours after we finished our hearing. That documentary is titled "The Making of RHODE." It has been talked about quite a bit in the social media over the past two months. There was even an article in Forbes where Ms. Bieber talked about it saying that it is going to be "two and a half years of footage." She goes on to say I want people to lift the hood up and be part of it and see how it started. And then she says this is how I'm going to introduce everything to the world. And that is what's

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1 going to happen, your Honor. This will, again, be another
2 exercise of defendants' rights that has the risk of superseding
3 and overtaking my client's rights. Everything that will happen
4 after this documentary is aired will confirm that it is
5 defendants that own this mark and not my client, even though my
6 client has superior rights on the mark.

7 We are concerned about this. Once I found out I
8 reached out right away to the other side, Mr. Hughes, I
9 expressed our concern. He indicated that he would look into
10 it. I didn't hear back from him yesterday. I heard back from
11 him this morning. The response was terse. It was basically we
12 will not delay the video. My ask, your Honor, was not that
13 they not ever show this video, it was simply that they put it
14 off for the weeks that we had discussed to mediate the case. I
15 know that they can do this because they were originally set to
16 launch this video on June 28th, and in the morning they posted
17 that the video was coming out and then, in the afternoon of
18 June 28, they posted that they were not going to release the
19 video any longer because they were adding more
20 behind-the-scenes footage and that it would come out sometime
21 in July. So I know that it can be stopped and I am asking the
22 Court, in keeping with the discussion that we had at the
23 hearing yesterday, to delay the release of this video so that
24 we can have discussions without my client suffering the harm
25 that will certainly ensue from this launch on YouTube which

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1 will be posted over and over and over again.

2 THE COURT: OK.

3 Mr. Rhodes.

4 MR. RHODES: Good morning, your Honor. First of all,
5 let me express our apologies that Mr. Hughes is not here. He
6 left this morning on a family vacation and is currently on a
7 plane. I will be brief and I have a suggestion that I will
8 make to the Court at the end.

9 The video is a marketing video, it is approximately 17
10 minutes long. I personally have reviewed it twice. It has
11 absolutely nothing to do with the plaintiff's business. Its
12 sole focus is how the skin care product line was developed,
13 inspiration, and sort of chronicled the journey that Ms. Hailey
14 Bieber was on in creating her skin care line. If anything, if
15 anyone were to see it, it would alleviate any potential for
16 confusion because it has absolutely nothing to do with
17 clothing.

18 Secondly, and I know the Court is presumably aware of
19 this, we read with interest this morning the PepsiCo opinion
20 that came out and I would suggest that in light of that opinion
21 and the current state of the record, that the motion for a
22 preliminary injunction should be denied without prejudice at
23 this time.

24 Thirdly, this current application is essentially a
25 temporary restraining order request to preclude it as a prior

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1 restraint against us continuing to market and promote our
2 products. There is no injunction in place. Now, I will say in
3 respect and out of my personal deference to this Court, I
4 reached the producer of the video overnight. Mr. Ratner is
5 currently on his honeymoon in Italy. I reached him overnight,
6 I managed to stop any dissemination of the video until we could
7 have a hearing today. I think it is absolutely inappropriate
8 that we are talking about enjoining the continuing marketing of
9 our products which are currently in commerce and being sold
10 but, nonetheless, out of respect for the Court I said hold the
11 thing until we have the hearing. What I would suggest to the
12 Court, if the Court would entertain this, is I will have a link
13 to the video emailed to you immediately and to opposing
14 counsel, and we should conclude this hearing and let you watch
15 it and then you can decide whether or not you think that it
16 should be subject to a temporary restraining order of the kind.

17 I would note, for the record, that at page 23 of the
18 transcript of yesterday's proceedings the Court noted that in
19 connection with any mediation it was not the Court's
20 expectation that we were going to be abandoning our mark.

21 The state of affairs today is that we are in commerce,
22 we have products that are being sold to thousands of customers.
23 We are actively marketing and promoting those products. There
24 is no injunction in place. And this is simply a specific form
25 of injunction, a temporary restraining order because it is

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1 being done in emergency circumstances. I literally had to
2 leave a golf round with my colleague this morning to come
3 attend this hearing. Mr. Hughes is on a plane. And there is
4 no reason we should be doing this in this properly rushed
5 circumstances but, because I trust this Court, I am happy to
6 send you the video now, conclude the hearing, and let you issue
7 an order as you see appropriate.

8 THE COURT: OK. I appreciate that.

9 Here is what I propose to do. I am going to issue a
10 ruling now on the preliminary injunction but it is subject to
11 my viewing the video. So, in other words, I won't put anything
12 on the docket until I have viewed the video and if I keep my
13 view then I will put something on the docket. And if I don't,
14 I won't. So let me do that and bear with me. And, I am sorry
15 to interfere with everyone's plans, I know it is a Friday and I
16 know you have been working hard to prepare not only for our
17 conference yesterday but I presumed and hoped that you would be
18 doling that to see if there would be some way to a mediated
19 result. But, it seems to me that because of this development
20 and, likely, further development, it is probably not realistic
21 to think that waiting a week is actually going to be useful.

22 So, plaintiff seeks an order preliminarily enjoining
23 defendants from continuing to manufacture or sell its
24 infringing RHODE, selling its RHODE products or using RHODE as
25 a name or mark. "A party seeking a preliminary injunction must

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1 show (1) irreparable harm; (2) either a likelihood of success
2 on the merits or both serious questions on the merits and a
3 balance of hardships decidedly favoring the moving party; and
4 (3) that a preliminary injunction is in the public interest."
5 N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., 883 F.3d
6 32, 37 (2d Cir. 2018).

7 My holding is that plaintiff is not entitled to a
8 preliminary injunction because it has not demonstrated a
9 likelihood of success on the merits on the federal trademark
10 claim. And also, in the alternative and on the issue of the
11 plaintiff showing both serious questions on the merits and the
12 balance of hardships decidedly favoring plaintiff, my finding
13 is that on the record the balance of hardships does not
14 decidedly tip in favor of plaintiff.

15 So that is the summary of my ruling. Let me explain
16 it. Bear with me.

17 So the first element of the federal trademark claim is
18 that plaintiff has a valid mark that is entitled to protection.
19 That is undisputed. However, plaintiff's application falters
20 on the second element, namely that "the defendants' actions are
21 likely to cause confusion with that mark." See *Tiffany & Co.*
22 *v. Costco Wholesale Corp.*, 971 F.3d 74, 84 (2d Cir. 2020).

23 A plaintiff "must demonstrate that the defendant's
24 actions are likely to cause confusion with that mark."
25 *Tiffany*, 971 F.3d at 84. Plaintiff's asserts infringement

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1 based on a reverse confusion theory. Reverse confusion exists
2 where a junior user "selects a trademark that is likely to
3 cause consumers to believe, erroneously, that the goods
4 marketed by the senior user are produced by the junior user.
5 *Lang v. Retirement Living Publication Co.*, 949 F.2d 576, 583
6 (2d Cir. 1991). "The reverse confusion theory protects the
7 mark of a senior user from being overwhelmed by a junior user,
8 typically, where the junior user is larger and better known and
9 consumers might conclude that the senior user is the
10 infringer." *LVL XIII Brands, Inc. v. Louis Vuitton Malletier*
11 *S.A.*, 209 F. Supp. 3d 612, 666 (S.D.N.Y. 2016).

12 In determining whether or not there is a likelihood of
13 confusion, Courts in the Second Circuit apply the eight factors
14 from the so-called Polaroid test and they are:

15 (1) the strength of the trademark; (2) the degree of
16 similarity between the mark and the defendant's allegedly
17 imitative use; (3) the proximity of the products and their
18 competitiveness with each other; (4) the likelihood that the
19 plaintiff will "bridge the gap" by developing a product for
20 sale in the defendant's market; (5) evidence of actual consumer
21 confusion; (6) evidence that the defendant adopted the
22 imitative term in bad faith; (7) the respect of quality of the
23 product; and (8) the sophistication of the relevant population
24 of consumers. And that is from the *Polaroid Electronics* case,
25 287 F.2d 492, 495 (2d Cir. 1961).

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1 Six of these factors directly relate to the likelihood
2 of confusion. The other two -- good faith and the quality of
3 the defendant's products -- are more pertinent to other issues
4 so let me start with the first factor which is the strength of
5 the mark.

6 Both parties' mark consists of the same single word
7 which is "RHODE" and this factor -- strength of the mark --
8 weighs in defendants' favor.

9 "The first pertinence of the strength of a mark has to
10 do with likelihood of public confusion. The more unusual and
11 distinctive a particular mark, the more likely the consumer
12 will assume, upon seeing it essentially replicated, that the
13 newly observed user is the same as or affiliated with the
14 originally observed user." *Guthrie Healthcare Sys. v.*
15 *ContextMedia, Inc.*, 826 F.3d 27, 41 (2d Cir. 2016). A mark's
16 "strength" is "crucial to the likelihood of confusion analysis"
17 in a reverse confusion case because the plaintiff's well-known
18 association with the claimed mark "makes it much more likely
19 that consumers will assume wrongly that the plaintiff is
20 somehow associated with the defendant's product or has
21 authorized the use of its mark." *Lois Sportswear U.S.A., Inc.*
22 *v. Levi Strauss & Co.*, 799 F.2d 867, 873 (2d Cir. 1986).

23 The strength of a mark is based on either or both of
24 two components: "(1) the degree to which the mark is inherently
25 distinctive; and (2) the degree to which it has achieved public

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1 recognition in the marketplace, sometimes calls acquired
2 strength." That's from *RiseandShine Corporation v. Pepsi*
3 *Company*, that decision was issued just today by the Second
4 Circuit, that is from page 9 and my page references from here
5 are to the full opinion.

6 Inherently strong marks receive greater protection.
7 Inherent distinctiveness is assessed using four categories of
8 marks that create increasing distinctiveness and, therefore,
9 protectability: (1) generic; (2) descriptive; (3) suggestive;
10 and (4) arbitrary or fanciful. See Id. As relevant here, a
11 descriptive mark is "one that tells something about a product,
12 its quality, ingredients, or characteristics."
13 *Gruner + Jahr USA Pub., a Div. of Gruner + Jahr Printing & Pub.*
14 *Co. v. Meredith Corp.*, 991 F.2d 1072, 1076 (2d Cir. 1993).
15 "Descriptive marks are presumptively unprotectable but can
16 acquire a degree of protection if they have acquired secondary
17 meaning, i.e. an acquired public recognition of the mark
18 identifying the source. *RiseandShine* at 11 and 12. A
19 suggestive mark suggests the product, though it may take
20 imagination to grasp its nature. Id. An arbitrary mark has an
21 actual dictionary meaning, but that meaning does not describe
22 the product, and a fanciful mark is a made-up name. See Id.

23 So plaintiff argues that its use of "RHODE" as a mark
24 is arbitrary and fanciful because the mark neither describes
25 nor suggests anything about the product, warranting the highest

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1 degree of protection, but under Second Circuit law, plaintiff's
2 mark is in the category of descriptive because "RHODE" is a
3 personal name. As plaintiff's co-founders acknowledged, their
4 clothing brand adopted the name of a Greek mythological sea
5 nymph "Rhode" known as the Goddess of Rhodes, R-H-O-D-E-S. I
6 also note that the more common name Rhoda, R-H-O-D-A, is
7 another spelling of the same first name and Rhode is, in fact,
8 the middle name of the defendant Hailey Rhode Bieber. Both
9 surnames and first names are generally regarded as descriptive
10 terms which require a secondary meaning in order to be
11 protected, *815 Tonawanda Street Corp v. Fay's Drug Company*, 842
12 F.2d 643, 648 (2d Cir. 1988), and that the plaintiff's mark
13 does not refer to a real individual does not warrant a
14 departure from this general rule. See *Tonawanda*, 842 F.2d
15 847-48 and *Hello I Am Elliot, Inc. v. Sine*, No. 19 Civ. 6905,
16 2020 WL 3619505, at *8 (S.D.N.Y. July 2, 2020).

17 Because the mark is descriptive, plaintiff must
18 establish that it has a secondary meaning for it to be
19 protectable. Put differently, because the mark is not
20 arbitrary or fanciful, it is important to evaluate whether the
21 mark has acquired distinctiveness in the market and that is
22 determined by analyzing six factors: "advertising
23 expenditures, consumer studies linking the market to a source,
24 unsolicited media coverage of the product, failed success,
25 attempts to plagiarize the mark, and the length and exclusivity

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1 of the mark's use." *Car-Freshener Corp v. American Covers,*
2 *LLC*, 980 F.3d 314, 329 (2d Cir. 2020). Like the entire
3 Polaroid analysis, each factor does not have to be proved and
4 no single factor is determinative.

5 We had some discussion yesterday about the
6 constructive use date. The plaintiff is required to show that
7 the mark established secondary meaning before the defendants'
8 constructive use date. It is unclear from the record when that
9 actually was. At the earliest it is February 6, 2020, the date
10 defendants' filed their trademark application for RHODE, and at
11 the latest it is mid-June 2022 when defendants' products
12 entered the market. See *PaperCutter, Inc. v. Fay's Drug Co.,*
13 *Inc.*, 900 F.2d 558, 565, (2d Cir. 1990); *Saratoga Vichy Spring*
14 *Co., Inc. v. Lehman*, 625 F.2d 1037, 1043, (2d Cir. 1980)).

15 In any event, I'm not going to resolve what the
16 constructive use date is here. I think it is not entirely
17 clear from the record and regardless of the date, it doesn't
18 change my conclusion.

19 Based on the record before me, plaintiff has not shown
20 that the mark RHODE has acquired a secondary meaning and
21 acquired recognition in the market, that the mark identifies
22 plaintiff as the source.

23 So, turning to the first factor, advertising,
24 plaintiff has presented evidence that it spent more than
25 \$1 million on brand advertising in 2021 and is on track to

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1 spend about 30 percent more in 2022. The issue I have with
2 that is that I can't tell whether these amounts are significant
3 in the relevant market and I don't have, from the record, a
4 basis for comparison.

5 Next, consumer study. Plaintiff did not present
6 consumer studies supporting a finding of secondary meaning.

7 Third, unsolicited media coverage. Plaintiff
8 submitted evidence of unsolicited media coverage. There are
9 several articles but the articles themselves, I don't find,
10 support a finding of secondary meaning.

11 Sales success. Plaintiff has achieved what it
12 describes as considerable sales success measured in terms of
13 revenues, growing the brand from \$100,000 in sales beginning in
14 2014 to \$9 million in 2021, and projected sales of
15 approximately \$14.5 million for 2022 and \$20 million for 2023.
16 So. So, based on those numbers, taken alone, it can be
17 inferred that plaintiff has achieved some sales success but the
18 issue I'm having is, again, I'm lacking context. The question
19 here is whether the mark has established its own secondary
20 meaning in the market as is evidenced by sales success, and so
21 the relevant measure to me seems to be, as compared to the
22 market as a whole to the underlying product. In other words,
23 does the product garner a big enough market share to suggest
24 that the mark has taken on its own secondary meaning -- and by
25 market share I just mean in terms of revenue. I can't tell and

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1 don't know if these are infinitesimally small numbers or if
2 they are quite large and impressive numbers. I don't have that
3 context in the record and so I don't have a basis to determine
4 that.

5 The next factor, attempts to plagiarize the mark.
6 Plaintiff has not presented evidence of any such attempt.

7 Finally, length and exclusivity of the mark's use.
8 "The longer and more exclusive the trade use, the more likely
9 it is that a mark has acquired secondary meaning, and Courts
10 often point to five years of exclusive use of a mark as
11 evidence of secondary meaning." *RVC Floor Decor, Ltd. v. Floor*
12 *and Decor Outlets of Am., Inc.*, 527 F. Supp. 3d 305, 318

13 Plaintiff has used its mark since 2014 but the
14 evidence is mixed as to when or how long that use has been
15 exclusive. Plaintiff asserts in its declaration that it is the
16 only company using RHODE standing alone as a clothing brand.
17 Defendants provide evidence that several entities use RHODE or
18 RHODES for similar goods, and when I say "RHODES" it is
19 R-H-O-D-E-S, including 10 for apparel and two more for
20 footwear, and I am referring to and incorporating by reference
21 the defendants' list of entities in their papers.

22 So, in sum, looking at these factors collectively,
23 they do not -- well, first of all, let me say individually I
24 don't think that any of them individually tips conclusively in
25 favor of plaintiffs and taking them together does not change

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1 the balance. So, based on the evidence at this time, my
2 finding is that the mark is weak and the strength of the mark
3 factor in the Polaroid does not favor a preliminary injunction,
4 and specifically that plaintiff has not shown the likelihood of
5 ultimately proving that its descriptive mark had acquired a
6 secondary meaning at the relevant time.

7 So let me turn to the other Polaroid factors more
8 quickly. The second is the similarity of the marks. It weighs
9 in favor of plaintiff. This inquiry looks at "how the marks
10 are presented in the marketplace." *Sports Authority, Inc.*, 89
11 F.3d at 962. Here the two marks consist solely of the single
12 word "RHODE" although, as defendant argues, the brand aesthetic
13 of each party is the virtual opposite from the other and the
14 typefaces and colors used by each are distinct. One notable
15 difference, in particular, is that between the two marks is
16 that the plaintiff tends to use all capitals whereas defendants
17 tend to use all lower case. In any event, I find that the
18 similarity of the marks, that factor tips in plaintiff's favor.

19 The third factor is the proximity of the products and
20 their competitiveness with each other. "The proximity factor
21 can apply to both the subject matter of the commerce in which
22 the two parties engage and the geographic areas in which they
23 operate." *Guthrie*, 826 F.3d, 39. Market proximity looks at
24 "whether and to what extent the two products compete with each
25 other," considering "the nature of the products themselves and

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1 the structure of the relevant market." *Cadbury Beverages,*
2 *Inc., v. Cott Corporation*, 73 F.3d 474, 480 (2d Cir. 1996).
3 This factor favors the defendants. While in a general sense,
4 cosmetics and women's clothing may be related products, they do
5 not serve common functions, they do not compete, they don't
6 share physical attributes, they are not inherently comparable.

7 The fourth factor is likelihood that plaintiff will
8 bridge the gap by developing a product for sale in defendant's
9 market. Plaintiff points to evidence that defendants intend to
10 bridge the gap into clothing citing statement of Ms. Bieber.
11 In her declaration she disclaimed any such intention and her
12 counsel stated on the record and repeatedly represented to the
13 Court that the defendants have no such intention. Ms. Bieber's
14 declaration states "In the future, I may use HAILEY RHODE for a
15 clothing label. I will not, however, use RHODE alone as a
16 trademark for a clothing line in the United States."

17 At this stage, prior to any discovery, the record is
18 too thin to support a finding that defendants intend to bridge
19 the gap under the "RHODE" mark and this factor, therefore,
20 favors neither party.

21 The fifth Polaroid factor is actual confusion. "It is
22 black letter law that actual confusion need not be shown to
23 prevail under the Lanham Act since actual confusion is very
24 difficult to prove and the Act requires only a likelihood of
25 confusion as to source." *Guthrie*, 826 F.3d at 45, *accord Reply*

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1 *All Corp. v. Gimlet Media, LLC*, 843 F. App'x 392, 397 (2d Cir.
2 2021). Nevertheless, "instances of actual confusion resulting
3 from a junior user's use of a mark similar to a senior user's
4 can be powerful evidence supporting a likelihood of confusion.
5 *Guthrie*, 826 F.3d at 44. I would also note that evidence of
6 actual confusion may also support a finding of secondary
7 meaning. See McCarthy on Trademarks and Unfair Competition,
8 Section 15:11 (5th ed).

9 Plaintiff presents anecdotal evidence purporting to
10 show actual confusion. I find that this factor is neutral
11 because the specific instances presented are problematic. Some
12 do not reflect confusion about the source of plaintiff's
13 product but, instead, reflect confusion about plaintiff's
14 correct Instagram handle or perhaps contact information. Some
15 do not reflect confusion but, instead, are simply inquiries or
16 observations, or some predate the defendant's launch. And
17 some, which are social media posts, I find, are inherently
18 unreliable.

19 Let me just make a comment about that.
20 Unauthenticated social media messages are insufficient to
21 support a finding of confusion. It is widely reported and well
22 known that social media messages, in general, are often
23 manipulated, sometimes generated by companies paid to generate
24 traffic to an account, sometimes sent by fictitious senders,
25 including bots, and sometimes containing insincere messages

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1 created to sew division or some other purpose unrelated to the
2 message.

3 So, for these reasons, I am finding that the actual
4 confusion factor is neutral.

5 Bad faith is the sixth Polaroid factor and it is
6 whether the defendant acted in bad faith in adopting the
7 imitative term. As I mentioned, this factor, along with
8 quality of the product, is not highly relevant to the
9 likelihood of confusion analysis. See *Virgin Enterprises Ltd.*
10 335 F.3d at 151. Rather "a finding that a party acted in bad
11 faith can affect the Court's choice of remedy or can tip the
12 balance when questions are close." *Id.* Here, plaintiff asserts
13 that defendants adopted the RHODE mark in bad faith after
14 plaintiff denied defendants' request to purchase its marks. At
15 this stage, before discovery, the record is too thin to support
16 any finding of bad faith and therefore I find that this factor
17 also favors neither party.

18 The seventh factor is quality of the product. This
19 factor primarily affects the issue of harm to the senior user's
20 reputation and is less pertinent to the likelihood of
21 confusion. *Virgin Enterprises*, 335 F.3d at 151. I am
22 considering this factor as neutral also.

23 Eighth, the buyer's sophistication. Plaintiff argues
24 that online shoppers are less discerning because of the medium.
25 Defendants respond that consumers of expensive clothing brands

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1 are sophisticated and careful. I find this factor to be
2 inconclusive on the current record.

3 So overall, where does that leave us? As the
4 RiseandShine Court pointed out it is a weighing and balancing
5 analysis. Examining all of the Polaroid factors as a whole, I
6 find that plaintiff has not sustained its burden of showing
7 sufficient likelihood of success on the merits to warrant a
8 preliminary injunction. Only the degree of similarity between
9 the parties' marks weighs in favor of plaintiff and that factor
10 is undercut by the fact that the mark is weak without much
11 evidence that plaintiff's mark has acquired distinctiveness
12 through secondary meaning. The lack of competitive proximity
13 between the parties' products also undercuts a finding of
14 likelihood of success on the issue of confusion. To be clear,
15 the fact that defendants are selling skin care products and
16 plaintiffs are selling women's clothing is an important fact in
17 my analysis. The remaining factors are neutral. Plaintiff may
18 well be able to show confusion at some later point but now and
19 on this record I find that it has not shown a likelihood of
20 success on that issue.

21 I want to address balance of hardships because the
22 standard of what needs to be shown at an injunction is in the
23 alternative, and in lieu of showing likelihood of success on
24 the merits, a plaintiff may prevail by a showing both serious
25 questions on the merits and a balance of hardships decidedly

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1 favoring plaintiff in order to obtain an injunction. See *N.*
2 *Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32,
3 37 (2d Cir. 2018). I'm not making a finding on whether the
4 plaintiff has shown serious questions on the merits because I
5 find that the balance of hardships aspect of the test has not
6 been shown.

7 "Courts must balance the competing claims of injury
8 and must consider the effect of each party of the granting or
9 withholding of the requested relief." *Winter v. Nat. Res. Def.*
10 *Council, Inc.*, 555 U.S. 7, 24 (2008).

11 Here, plaintiff contends that it will continue to be
12 harmed without injunctive relief as it will lose control of the
13 RHODE identity and lose sales to confused consumers.
14 Defendants contend that they would incur substantial
15 re-branding cost, lost sales, and harm to its goodwill if this
16 Court issues the requested preliminary injunction enjoining
17 defendants from continuing to manufacture or sell its
18 infringing -- allegedly -- RHODE products or use RHODE as a
19 name or mark. These hardships I find do not "decidedly" tilt
20 in plaintiff's favor, particularly where defendants have
21 disclaimed any intent to enter into the clothing market. See
22 *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 897 (2d
23 Cir. 2015).

24 Accordingly, for this alternative reason, the
25 preliminary injunction is denied. The denial is without

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1 prejudice. As I have said on the record before me, I have
2 found what I found, I won't repeat it all, but it is without
3 prejudice. It is also subject to my review of the video, as I
4 have earlier said.

5 So we have a court reporter, there should be a
6 transcript, and I will review the video. As soon as I have, I
7 will issue an order. I will issue an order one way or the
8 other.

9 So, we are adjourned. Thank you.

10 o0o